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IN THE

Supreme Court Of The United States

OCTOBER 1965 TERM

No. 873

~~RUDOLPH HENRY FRUSE, SR., and~~
WABASH FIRE AND CASUALTY INSURANCE COMPANY, - - - - - Petitioner

versus

UNITED STATES OF AMERICA, - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RUDOLPH HENRY KRUSE, SR., and
WABASH FIRE AND CASUALTY
INSURANCE COMPANY - - - - *Petitioner*

vs.

UNITED STATES OF AMERICA, - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May it please the Court:

Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals For the Sixth Circuit.

OPINIONS BELOW

The Order and Opinion of the District Court for the Western District of Kentucky is unreported and is printed in Appendix B hereto, infra page 5a. The Opinion of the Court of Appeals for the Sixth Circuit is printed in Appendix A hereto, infra, page 1a and is unreported.

JURISDICTION

The Judgment of the District Court was entered on June 5, 1964, and is printed in Appendix C hereto, infra, page 7a hereto. The Opinion of the Court of Appeals was entered on November 5, 1965. A timely petition for rehearing was denied on December 4, 1965.

Jurisdiction of the Court of Appeals rests on 28 U.S.C. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

This case presents for decision the question of whether the Court of Appeals erred in applying the wrong test of judicial review in affirming the lower court's judgment on a criminal bail bond forfeiture in the amount of $20,000.00, because they refused to review the lower court's decision on the grounds that they could only do so if said decision was arbitrary and capricious.

STATUTE INVOLVED

The statute involved in this case is Federal Rules of Criminal Procedure 46 (f) (2) and (4), which provides as follows:

> (2) SETTING ASIDE.—The Court may direct that a forfeiture be set aside upon such conditions as the Court may impose if it appears that justice does not require the enforcement of the forfeiture.

(4) REMISSION.—After entry of such judgment, the Court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in Paragraph (2) of this subdivision.

STATEMENT OF THE CASE

This case involves an unbelievable situation wherein the F.B.I. requested the assistance of a bail bondsman to help solve a bank robbery and then to help in getting a fugitive from justice to surrender by agreeing to sign a $25,000.00 bail bond for one-half the premium price of the bond. The fugitive appeared for trial as requested by the Court, was tried by jury, and while the jury was deliberating on its verdict, he fled the jurisdiction only to be recaptured thirty-two or thirty-three days later, returned to court and sentenced to twenty-five years. The trial Court, based upon an estimate that the Government made saying it expended more than $6,000.00 to apprehend Kruse, felt that justice did not require enforcement of the forfeiture in its entirety and entered judgment in the amount of $20,000.00.

On February 25, 1963, Rudolph Henry Kruse, Sr., was indicted in the Western District of Kentucky at Louisville, on charges of conspiracy and aiding and abetting a bank robbery. On that date a bench warrant was issued and bond was set in the amount of $25,000.00, returnable before the District Court on March 18, 1963, at 9:30 a.m. On March 18, 1963, Kruse was a fugitive and an order was entered continuing

his case indefinitely pending further orders of the Court. On July 9, 1963, the warrant of arrest for Kruse was returned executed. On that date, bond in the amount of $25,000.00 returnable at 9:30 a.m., on October 7, 1963, was executed by the Wabash Fire and Casualty Insurance Company as surety, and said bond was signed by the surety company's agent, Marvin Berg, who was acting for Louisville bondsman, Lawrence Detroy.

Kruse was surrendered on July 9, 1963, to agents of the F.B.I. by his attorney and Detroy. Between July 9, 1963, and October 7, 1963, Kruse remained free on bond. On October 7, 1963, Kruse appeared before the Court, entered a plea of not guilty, and his trial was set for October 25, 1963, at 9:30 a.m., and he was allowed to continue on his bond until that time. Pursuant to court order, Kruse appeared in court on October 25, 1963, and stood trial. The record fails to disclose any further court order requiring the defendant's appearance (C.A. App. p. 10a)*. The jury retired to consider its verdict at approximately 5:01 p.m. At approximately 5:55 p.m., the jury returned to the courtroom to ask a question; however, the defendant, Kruse, was not present. A bench warrant was issued for the arrest of the defendant. Whereupon the Court adjourned until the next day at 10:00 a.m. The jury returned at the required time the next morning, but the defendant did not return. The Court then answered a

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* Reference herein to the Petitioner's Appendix in the Court of Appeals is designated as (C.A. App. p. ....) and when made to the Appendix attached to this Petition is designated as Appendix ....

question that the jury had asked. At 10:12 a.m., the jury retired to consider its verdict. After five minutes of deliberation they returned a verdict of guilty, as to two counts. Following the return of the verdict, the United States moved for a bond forfeiture, which motion was immediately sustained. The surety company, by counsel, requested permission to file a response. The Court gave counsel the right to file a motion to set aside said forfeiture (C.A. App. p. 62a).

Kruse remained a fugitive until November 27, 1963, when he was apprehended in Palo Alto, California. On December 23, 1963, Kruse was sentenced to 20 years in the penitentiary, which sentence he is now serving. On March 2, 1964, the United States filed a motion for judgment on the previously forfeited bond in the amount of $25,000.00. On March 30, 1964, the surety filed motions to set aside the forfeiture or in the alternative to remit any judgment. Both parties filed memorandums of law and supporting affidavits. On June 5, 1964, the lower Court entered a judgment against the defendant and his surety in the amount of $20,000.00. On the same date the surety again moved for partial remission of said judgment in the amount of $13,760.00 and asked that judgment be entered in an amount not to exceed the sum of $6,239.80, which was the amount the United States alleged they spent in apprehending the defendant, Kruse. Said motion was denied by the lower court.

In addition to the above stated surface facts there was a great deal going on in this case between Lawrence Detroy, a bondsman and agent for Wabash Fire and

Casualty Insurance Company, and Special Agent, William R. Duncan of the F.B.I. For a better understanding of the issues raised by this Petition, we set forth briefly, but in some detail, the facts. On September 10, 1962 and on October 10, 1962 two banks in Louisville, Kentucky, were robbed. The Federal Bureau of Investigation immediately began their investigation. One of the F.B.I. agents assigned to these cases was Special Agent, William R. Duncan. Lawrence Detroy is a local bail bondsman who signed bonds as agent for the Wabash Fire and Casualty Insurance Company. The affidavits of Duncan and Detroy which are part of the record, set out in detail the relationship that existed between this arm of the Federal Government and Detroy and appears in Appendix D hereto, infra page 8a, and Appendix E hereto, infra page 16a.

Agent Duncan contacted Detroy following the first bank robbery and requested him to obtain what information he could concerned a John K. DeJarnette and whoever may have been connected with him in the robbery. Duncan also asked Detroy to try to locate and arrange to buy or exchange the stolen bank robbery money. Detroy agreed and in this respect, one William Merchant, contacted Detroy at his bonding office about selling or exchanging the money. Detroy called Duncan and was advised to stall Merchant until agents could arrive to set up a surveillance, which was done. Duncan also told Detroy to tell Merchant that he might have an outlet for the money.

Some of this assistance which Detroy was giving agent Duncan, occurred before Kruse was ever indicted. In October of 1962, Kruse, Sr., twice called Detroy by long distance telephone. Detroy told of both of these calls to Duncan. In November of 1962, Kruse and Detroy met by prearrangement in a Louisville restaurant. Following Duncan's previous instructions, Detroy sought to ascertain from Kruse who was involved in the holdups and the possibility of getting the robbery money. Kruse gave no information and Detroy reported this to Duncan.

Sometime in the spring of 1963, after being indicted, Kruse contacted Detroy and asked if he would make his bond. They exchanged several phone calls, all of which Detroy reported to Duncan.

Duncan requested Detroy to attempt to get Kruse to surrender and to advise him that nothing could be done about lowering the bond as long as Kruse was a fugitive. Detroy passed this information on to Kruse. Kruse reported to Detroy that he could not pay a $25,000.00 bond premium (the premium is 10 per cent of the amount of the bond) and that he, Kruse, would not surrender unless he was sure he could make bond. Detroy, still working in connection with Duncan and desiring to assist, agreed to make the $25,000.00 bond for one half the price, namely $1,250.00. (Of this $1,250.00, $500.00 went to Wabash Fire and Casualty Insurance Company and $750.00 was retained by Detroy.)

Detroy's contract with Wabash is such that he must indemnify them for any damage that they might ever

suffer as a result of a forfeited bond. With the assurance that Detroy would make a bond, Kruse, in the presence of his attorney and Mr. Detroy, surrendered to agent Duncan, and Mr. Detroy's associate, Marvin Berg, signed his bond. Detroy is emphatic in his affidavit that he would not have made Kruse's bond other than through a desire to assist agent Duncan. Detroy has worked closely with Duncan and other federal agents in the past.

Detroy states that he was in the courtroom at the conclusion of Kruse's trial; that he spoke to Kruse briefly when the jury retired. Detroy says that he saw Kruse sitting outside the courtroom with his family and that he was under the impression that Kruse was in the custody of the marshal, which is the practice in the State courts in Kentucky. Detroy asked why Kruse was not in custody, and was then advised by a deputy United States marshal that Kruse was not in custody. Detroy then walked about one half way around the Federal Building to the office of the trial judge, where he knocked on the door. He, in fact, was knocking on a reception room door and as a result received no reply. His intention was to request the judge or order the marshal to take Kruse into custody. Detroy then returned to the courtroom and could not find Kruse. He then searched several restaurants in the area and sent an employee to the airport. At the airport the employee was given a picture of Kruse by an F.B.I. agent who arrived there. This employee of Detroy's immediately flew to Indianapolis in hopes of finding Kruse there. While Kruse was a fugitive, Detroy

continued to pass on to agent Duncan any leads or rumors he could obtain concerning Kruse's whereabouts. For instance, Detroy passed on information about Kruse's whereabouts in California. Very shortly thereafter Kruse was arrested in California.

Detroy expended a great deal of time and money in trying to locate Kruse, but most of his outlay was in the form of cash for information, and he has no exact records to prove the amount (C.A. App. p. 27a).

Agent Duncan in his Affidavit, Appendix E hereto, infra page 16a, does not contradict in any material respect the facts contained in Detroy's Affidavit (Appendix D) of how Detroy helped the F.B.I. Duncan acknowledges Detory's assistance. He also acknowledges Detroy's help and his supplying of information that Kruse, after he fled the courtroom, was traced to California. However, although he admits Kruse was arrested in California, he says that it was not as a result of Detroy's information.

REASONS FOR GRANTING THE WRIT

A. The decision of the Court of Appeals conflicts with a decision of the Seventh Circuit.

The Sixth Circuit Court of Appeals erred in the application of law cited and upon which it relied in offering the judgment of the District Court by holding it was not at liberty to grant relief to Petitioner *unless* the discretion exercised by the District Court was clearly arbitrary and capricious. In so holding the

Court of Appeals relied on the case of *United States* v. *D'Argento,* 339 F. 2d 925, from the Seventh Circuit. *However, such a holding is in conflict* with the decision in the *D'Argento* case because the appellate court reversed *without* applying the arbitrary and capricious test. In *D'Argento* the Court found that before this test could be applied in reviewing the amount of the judgment it must first be determined as a matter of law if the criterion of Rule 46 had been met, namely, "Does justice require enforcement of the forfeiture?" In Petitioner's case *the District Court actually held that justice did not require the enforcement of the forfeiture in its entirety.* This is similar to the finding of the *District Court* in the *D'Argento* case which found that justice did not require the enforcement of the forfeiture in its entirety and the Court remitted $40,000 of the $50,000 forfeiture. In reversing the District Court the Seventh Circuit discussed the scope of the appellate review and made the following distinction:

> "And, where the ends of justice so require enforcement of the forfeiture, and thus preclude its being set aside, the amount, if any, of the judgment which, in the light of the attending circumstances, should be remitted in a matter committed to the exercise of the sound discretion of the District Court."
>
> * * *
>
> "Thus, the District Court is given discretion to 'temper justice [enforcement of the forfeiture] with mercy' where, on a motion for remission, the

extent of enforcement is the subject for consideration and determination, and the scope of review of the exercise of that discretion is limited. But, Rule 46 (f) (2) prescribes a standard—the requirements of justice—which applies to the consideration of a motion to set aside a forfeiture, and which must be met before enforcement in any degree is to be ordered on the determination of such a motion. It is clear from the Rule the forfeiture is to be set aside if justice does not require its enforcement. It is only where justice requires enforcement that discretion can operate to determine the degree or extent of enforcement and what, if any, conditions are to be imposed."

"Whether a District Court has erred in not setting aside a forfeiture is a matter to be determined by reference to the criterion the Rule prescribes as the definitive measure—does justice require enforcement of the forfeiture? *And, review for the purpose of determining whether the court's action represents the application of that criterion is not circumscribed by the considerations which apply to restrict the scope of review of the exercise of judicial discretion.*"

* * *

"We think it obvious the ends of justice did not require enforcement of the forfeiture. And, if justice does not require the enforcement of a forfeiture of bail there is no basis under the Rule for such enforcement."

* * *

"We cannot agree with the government's contention which, in substance, is that we test the court's ruling by the considerations applicable to

a review of the exercise of judicial discretion. Such considerations apply to review of a refusal to remit a judgment on a forfeiture where, in the first instance, the forfeiture itself was not vulnerable to a motion to set aside—was a forfeiture which required enforcement." (pp. 928-929).

The same distinction as to the scope of judicial review that existed in the *D'Argento* case exists in the present controversy.

District Judge Brooks in his order of May 20, 1964, Appendix B, held as follows:

> "Under all the circumstances of this case, it appears that justice does not require the enforcement of the forfeiture in its entirety and judgment in the sum of $20,000 will be entered . . ."

The order entered by Judge Brooks is substantially the same as that which was entered by the District Court in the *D'Argento* case, and as held by the Seventh Circuit, if justice does not require the enforcement of the forfeiture, *no judgment should be entered against the Surety.* Only when justice does require the enforcement of the forfeiture does the lower court have the right to exercise its judicial discretion as to the amount that the Surety must pay, and this latter exercise of discretion can only be reviewed if it is clearly arbitrary and capricious.

If this Court follows the holding of the *D'Argento* case, then the finding of Judge Brooks in this case, that justice does not require enforcement of the forfeiture in its entirety, must mean that the judgment

of forfeiture should be set aside in its entirety, and the failure to do so may be corrected by the Sixth Circuit just as the Seventh Circuit did in *D'Argento.*

Unquestionably, the District Court has the power within its discretion to set aside a bond forfeiture or to remit a judgment on a forfeiture, in full or in part, if justice so requires, Rule 46, Federal Rules of Criminal Procedure. The Court may grant this relief even though the forfeiture was caused by the wilful action of the defendant.

In *U. S.* v. *Smith,* D.C. Western District of Kentucky, at Louisville, 5 Fed. Rules Decisions 274, the defendant wilfully failed to appear on the date set for his trial. Two days later he did appear and was sentenced. Prior to the enactment of the present Federal Criminal Rules, remission of bail, in full or in part, was governed by Section 601, Title 18 U.S.C.A. Judge Shelbourne in remitting three-fifths of the forfeited bond held as follows:

> "The Circuit Court of Appeals for the Sixth Circuit held that the Court's discretion was not unlimited, but was a judicial discretion to be exercised only whenever it appeared that there had been: (1) no wilful default of the party; (2) that a trial could, notwithstanding be had; and (3) that justice did not require the penalty to be enforced."

Now, however, the requirements are different:

> "The absence of any reference to 'wilful default' in Rule 46 and empowering the Court to set aside a forfeiture where justice does not re-

quire its enforcement, clearly indicated an intention to broaden the discretion of the trial Court."

Smaldone v. *U. S.*, 211 F. 2d 161, 10th Circuit, cites and follows the *Smith* case on this question of wilfulness.

District Judge Brooks held in his written opinion that, "justice does not require the enforcement of the forfeiture in its entirety and judgment in the sum of $20,000.00 will be entered . . ." (C.A. App. pp. 45a and 46a). Hence the Court agrees with the surety that a full forfeiture of this bond would be unjust. It is the surety's contention, however, that a judgment for $20,000.00 is absolutely punitive in nature. The government admits to spending $6,239.80 in apprehending Kruse and returning him to Louisville (C.A. App. p. 32a). The equities of this case would dictate that said sum be the maximum amount of any judgment.

The purpose of a bond is not punitive in nature, but is to secure the defendant's presence and his response to the judgment, *Dudley* v. *U. S.*, 242 F. 2d 648, 5th Circuit. Kruse, Sr., was present at his trial and is now serving the sentence he received. The objectives of a bond have been met. Why should the government be given $13,760.20 more than it expended in apprehending Kruse? The amount of a bond is not to serve as a liquidated penalty, yet the judgment in this case gives just such a windfall to the United States.

Smaldone v. *U. S.*, supra, sets out with clarity the

type of discretion that a judge should use in cases of this kind:

> "And in this connection, the term discretion when used as a guide to judicial action means sound discretion, not discretion exercised arbitrarily but with due regard for that which is right and equitable under the circumstances. It means discretion directed by reason and conscience to a just result." (Cases cited).

What is equitable under the circumstances of this case? Lawrence Detroy is liable to the surety company for any judgment they might have to pay. Hence, it is his $20,000.00 that is really at stake. What has Detroy done that in the name of justice requires this very large forfeiture? He has assisted federal agents to the limit of his ability at all stages of the development of this case. As soon as the two banks in Louisville were robbed, agents contacted Detroy for assistance. Originally they did not know who committed the thefts or who had the money. When the F.B.I. learned who actually committed the robbery they still sought Detroy's assistance in making a case against the accomplices and in recovering the money. One accomplice was Kruse, Sr., who was a fugitive after being indicted. Kruse was in contact with Detroy and these contacts were passed on to agent Duncan. Detroy says Kruse would not surrender unless the posting of his bond was guaranteed. This position certainly makes sense; therefore in order to assure Kruse's surrender, Detroy agreed to make the $25,000.00 bond for one-half the cost of the premium.

If Detroy had not made the bond then, it is safe to assume Kruse would not have surrendered, and the F.B.I. would have to had spent more time and money in trying to capture him. Hence, Detroy was of valuable assistance to the F.B.I.

After the trial but before sentencing, Kruse fled and once again became a fugitive. When the jury retired to consider its verdict, Detroy was told by a Deputy Marshal that Kruse was not in custody. However, in his affidavit the Deputy, Young, said he then saw Kruse walk toward the doorway of the Federal Building (C.A. App. 43a). Was there not some duty on his part when he saw a defendant leaving the building while a jury was deliberating on his case to stop him? Detroy went to Judge Brook's office but received no reply to his knock. He then returned to the courtroom and could not find Kruse. Detroy went to several neighboring restaurants but could not find the defendant. He immediately sent a representative to Indianapolis knowing Kruse had connections there. Later Detroy gave the F.B.I. several sources in California which might lead to Kruse's arrest.

For all of this help and assistance, both before and after the trial, Mr. Detroy is to be rewarded by having to pay a $20,000.00 judgment. It is common knowledge that federal agents need information, tips and outside assistance to properly perform their work. Such assistance is invaluable in saving time and money.

Usually when a defendant jumps bond the surety is not at fault. Clearly this is true in the instant case. As previously related, Mr. Detroy did all within his

power to see that Kruse was recaptured. He spent time and money in this endeavor, yet he is no worse off than if he had done nothing. $20,000.00 will bankrupt Detroy just as effectively as $25,000.00. If bondsmen are led to believe that their assistance and cooperation with federal authorities will gain them no benefit then understandably they will not only cease rendering aid but will also quit making federal bonds due to the unbearable risk. If this $20,000.00 judgment is allowed to stand then Detroy and other bondsmen will have no incentive to render services to our federal courts.

This case is far different than any which we find reported concerning a judgment on a bond forfeiture. In this case, an Agent of the United States Government, Duncan, requested the help of Surety, Detroy, to solve a bank robbery and actually requested him to obtain evidence on the serial number of the stolen money. (C.A. App. pp. 20a and 21a). This same Agent requested Detroy's help to get Kruse to surrender when he was a fugitive. Kruse refused to surrender unless the $25,000.00 bond fixed on the bench warrant was reduced. After an attorney failed in his attempt to have the bond reduced, and Kruse refused to surrender unless he was assured that he would be immediately released on bond, so strong was Detroy's desire to help the Government Agent, that he agreed to make Kruse's bond of $25,000.00, for one-half of the required bond premium, which in effect gave Kruse the benefit as though the bond had been reduced to $12,500.00 (C.A. App. p. 24a). The facts, as stated in both

Detroy's and Duncan's Affidavits, clearly prove that Detroy was actually acting on behalf of the United States Government at the request of Special Agent, Duncan, when he convinced Kruse to surrender to the Agent and executed his bail-bond. Is it fair or equitable for the United States to say to Detroy, even though you tried to help us again after Kruse fled the courtroom, by furnishing certain information, we want $20,000.00 of your money because we found him independent of the information you supplied? This certainly is not consistent with the fairness which has characterized the administration of justice in the Federal Courts. To require Detroy to pay any amount would be a clear abuse of judicial discretion and the fair administration of justice requires that the judgment entered on this bond forfeiture be set aside and the surety be discharged from any further obligation.

Every possible equity exists on behalf of Mr. Detroy in this case. To burden him with a $20,000.00 judgment is to ignore all the mitigating facts and clearly demonstrates an arbitrary exercise of discretion.

Bonds in criminal cases are contracts which must be strictly construed according to their terms. *Dudley* v. *U. S.*, supra. The bond of the defendant, Kruse had the following provision:

> "The defendant is to appear . . . at 9:30 A. M., on October 7, 1963, and from time to time thereafter, and at such other places as the defendant may be required to appear in accordance with any and all orders and directions relating to the defendant's appearance in the above en-

titled matter as may be given or issued by the United States District Court . . ."

The record in this case shows that Kruse was ordered at arraignment to appear for trial on October 25, 1963, at 9:30 a.m. and that he *"will remain on the terms of his bond for his appearance on that day"*. (C.A. App. p. 10a). The record is silent as to Kruse being ordered to appear at any other time or place. *When the jury retired to consider its verdict the Court did not order the defendant to appear at some later time, nor did it tell him he was to remain free under the terms of his bond.* All the Court stated was, "Mr. Marshal, you will conduct the jury, and let's recess Court until the return of the jury." (C.A. App. p. 56a).

In *Eisner* v. *U. S.*, 6th Circuit, 323 F. 2d 38, 43, the Court held that the obligation of the surety must be determined from the terms of the bond itself:

> ". . . if the Court [District Court] gave no direction with the result that there was no disobedience of a direction of the Court, there is no obligation under the bond. Bail bonds, which do not always use the same language, are to be strictly construed in favor of the surety and no recovery should be had upon such a bond except upon a clear showing of liability under its express conditions," (Cases cited).

When the jury retired, the District Court Judge should have taken Kruse into custody or expressly ordered that he was permitted to remain free on the terms of his bond. Failure of the Court to so order leaves the Surety, petitioner herein, free of any dis-

obedience of any court order or direction. Hence, when Kruse appeared and stood trial on October 25, 1963, he had complied with his bond and the Court's order. The Surety should be relieved of its obligation as of that time.

CONCLUSION

Petitioner feels that the fundamental fairness upon which our system of justice is founded will not permit one arm of the Government to seek his help in the administration of justice and as a reward have another of its arms to take from him $20,000.00. For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT

Filed Nov. 5, 1965, Carl W. Reuss, Clerk
Not Approved For Publication
No. 16131

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America - Plaintiff-Appellee

v.

Rudolph Henry Kruse, Sr. and
Wabash Fire and Casualty
Insurance Company - Defendant-Appellants

APPENDIX

Appeal from the United States District Court
for the Western District of Kentucky

Decided November 5, 1965

Before: Weick, Chief Judge, Celebrezze, Circuit Judge, and Cecil, Senior Circuit Judge.

Per Curiam. On February 25, 1963, Rudolph Henry Kruse, Sr. was indicted on charges of conspiracy and aiding and abetting a bank robbery. From March 18, 1963 until July 9, 1963, Kruse was a fugitive. On July 9, 1963, Kruse surrendered, and a bond in the amount of $25,000 was executed by the Appellant—Wabash Fire and Casualty Insurance Company. Pursuant to a Court order, Kruse appeared in court on October 25, 1963 and stood trial. The jury retired

APPENDIX A

OPINION OF THE COURT

Filed Nov. 5, 1965, Carl W. Reuss, Clerk
Not Approved For Publication
No. 16131

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America - Plaintiff-Appellee
v.
Rudolph Henry Kruse, Sr. and
Wabash Fire and Casualty
Insurance Company - Defendant-Appellants

Appeal from the United States District Court
for the Western District of Kentucky

Decided November 5, 1965

Before: WEICK, Chief Judge, CELEBREZZE, Circuit Judge, and CECIL, Senior Circuit Judge.

PER CURIAM. On February 25, 1963, Rudolph Henry Kruse, Sr. was indicted on charges of conspiracy and aiding and abetting a bank robbery. From March 18, 1963 until July 9, 1963, Kruse was a fugitive. On July 9, 1963, Kruse surrendered, and a bond in the amount of $25,000 was executed by the Appellant —Wabash Fire and Casualty Insurance Company. Pursuant to a Court order, Kruse appeared in court on October 25, 1963 and stood trial. The jury retired

to consider its verdict at approximately 5:01 p.m. At about 5:15 p.m. the jury returned to the courtroom to ask a question. However, Kruse had fled. The next day the jury returned a verdict of guilty. Kruse remained a fugitive until November 27, 1963, when he was apprehended in California. On March 2, 1964, the United States filed a motion for judgment on the previously forfeited bond in the amount of $25,000. On June 5, 1964, the District Court entered a judgment against the defendant and his Surety in the amount of $20,000. On the same date the Wabash Fire and Casualty Insurance Company moved for a partial remission in the amount of $13,760.00 and asked that judgment be entered in an amount not to exceed the sum of $6,239.80, which was the amount the United States spent in apprehending the defendant Kruse. The Surety appeals from the final judgment of the District Court. The Surety maintains its agent, Lawrence Detroy, worked with the F.B.I. in urging Kruse to surrender himself on July 9, 1963, and also gave information to the F.B.I. as to the whereabouts of Kruse after he fled on October 25, 1963.

Rule 46 (f) (2) and (4), Federal Rules of Criminal Procedure, 18 U.S.C.A. provides:

> "Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."
>
> "Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in Paragraph (2) of this subdivision."

The rule gives a great deal of discretion to the District Court. Unless the action of the District Court is clearly arbitrary and capricious, this Court is not at liberty to grant relief. *Larson* v. *United States*, 296 F.2d 167 (C.A. 8, 1961), and *United States* v. *D'Argento*, 339 F.2d 925 (1964). Here the defendant breached his bail bond by his failure, without justifiable excuse, to remain in court as required. The purpose of the bail bond is not to reimburse the Government for expenses in apprehending a fugitive. The primary object of the bond is to secure the attendance of the accused, to answer the indictment, submit to trial and the judgment of the court. *United States* v. *D'Argento, supra.* This Kruse wilfully failed to do, to the prejudice of the Government. The judgment of the District Court was not arbitrary and capricious.

The bail bond in this case provided, in part, as follows:

> "The conditions of this bond are that the defendant Rudolph Henry Kruse, Sr., is to appear in the United States District Court for the Western District of Kentucky at Louisville, Kentucky, at 9:30 a.m. on October 7, 1963, and from time to time thereafter, and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in the above entitled matter as may be given or issued by the United States District Court for the Western District of Kentucky * * *
>
> "It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated."

Under the terms of this bond, the departure of the defendant, without leave, after the jury retired to consider their verdict, rendered the Surety liable. *United States* v. *Pleason*, 26 F.2d 104 (1928); 8 Am. Jur. 2d, Bail, § C.J.S., Bail § 82.

For the foregoing reasons the judgment of the District Court is affirmed.

APPENDIX B

ORDER—Filed May 20, 1964

This cause is submitted on the motion of the United States for judgment in the penal sum of $25,000 folowing the failure of Rudolph Henry Kruse, Sr., principal, and Wabash Fire and Casualty Insurance Company, as surety, to comply with the terms of a bail bond for the appearance of the principal. An order of forfeiture was entered on October 29, 1963, and the surety has filed a motion to set aside the forfeiture or in the alternative to remit in whole or in part any judgment that might be entered. In support of these motions an affidavit of a general agent of the surety has been filed stating certain efforts exerted by him to apprehend the principal. Although these efforts did not result in the apprehension of Kruse the fact that they were made is a matter that is properly considered in passing on the pending motions. An affidavit filed by the government discloses that it has expended more than $6,000.00 in its successful effort to apprehend the principal.

Under all the circumstances of this case it appears that justice does not require the enforcement of the forfeiture in its entirety and judgment in the sum of $20,000.00 will be entered, counsel for the government to submit judgment on notice. May 20, 1964.

Henry L. Brooks
United States District Judge

For the Plaintiff:
William E. Scent, Esquire
United States Attorney
Louisville, Kentucky

Order

For the Defendant-Principal and Surety:
Frank E. Haddad, Jr., Esquire
Kentucky Home Life Building
Louisville, Kentucky
George H. Logan, Esquire
Kentucky Home Life Building
Louisville, Kentucky

A Copy: Attest
Martin R. Glenn, Clerk
By /s/ Loraine Miller
Deputy Clerk

APPENDIX C

JUDGMENT—Tendered June 5, 1964

This cause coming on for a hearing on the motion of the United States of America for judgment against Rudolph Henry Kruse, Sr., and Wabash Fire and Casualty Insurance Company in the sum of $25,000.00, upon a bond executed by Rudolph Henry Kruse, Sr., as principal, and Wabash Fire and Casualty Insurance Company as surety, conditioned upon the appearance of Rudolph Henry Kruse, Sr., in this Court to answer a charge of the United States against him, and the Court being sufficiently advised in the premises, and decreeing the response insufficient in part.

It is therefore ORDERED and DECREED that the United States of America recover from Rudolph Henry Kruse, Sr., defendant-principal, and Wabash Fire and Casualty Insurance Company, surety, the sum of Twenty Thousand ($20,000.00) Dollars on said bond.

/s/ Henry L. Brooks
Judge, U. S. District Court

Date: June 5, 1964

A Copy: Attest
Martin R. Glenn, Clerk
By /s/ Loraine Miller
Deputy Clerk

APPENDIX D

AFFIDAVIT OF LAWRENCE DETROY

Comes Affiant, LAWRENCE DETROY, of Louisville, Kentucky, and states that he is a general agent for the Wabash Fire and Casualty Insurance Company, the surety on the Bail Bond of Rudolph H. Kruse, Sr.

Affiant states that on or about September 11, 1962, a day or so after the robbery of the Liberty National Bank and Trust Company, Seventh and Hill Branch, Louisville, Kentucky, Mr. William Duncan, Special Agent for the Federal Bureau of Investigation, asked me about several people who may have been connected with John K. DeJarnette. One of these persons was Rudolph H. Kruse, Sr. I had no information at the time but advised Agent Duncan that I would try to get some information and would contact him. Agent Duncan asked Affiant to see what he could find out about the robbery and the possible recovery of the money.

I thereafter made several phone calls trying to obtain some information. I talked to Rudolph H. Kruse, Sr., who advised me that he did not know John K. DeJarnette and had nothing to do with him. I reported this information to Agent Duncan.

On or about October 10, 1962, the morning of the day that John D. DeJarnette robbed the second bank, an ex-convict, William Merchant, came to Affiant's bonding office and asked Affiant if he knew where the bank money could be sole [sic] or exchanged and that he had been in contact with John K. DeJarnette. (It was common knowledge and had been in the newspapers that John K. DeJarnette was wanted for the

first robbery). Said Merchant wanted to [Page 1] borrow Ten Dollars from me. I had him to wait on the pretense that he had to go to police court to make a bond for someone. Instead I immediately telephoned Agent Duncan and conveyed this information. I was told to try to stall Merchant until agents could get there to keep him under surveillance. I was also told by Agent Duncan to tell Merchant that I knew who would or might be interested in buying the money. Merchant then told me that he could call me the next night and tell what proposition could be made. (Later this same morning or day or so after the second bank was robbed, it was determined that the robber was John K. DeJarnette).

On or about October 11, 1962, the day after Merchant was in the office and the day after DeJarnette's second bank robbery, Agent Duncan by prearrangement came to my home at 7:00 A.M., and stayed until about 10:00 P.M., to wait for Merchant's call. When Merchant did not call by 10:00 P.M., Agent Duncan left. (It was also learned by Affiant that Merchant was kept under surveillance and was in the State of Ohio).

On or about October 13 or 14, Rudolph Kruse, Sr., talked to me twice by phone. He said he was out of town and would call me when he came to town on November 29 or November 30, 1962. (It should be noted that Kruse had not as yet been indicted and was no [sic] so charged or indicted until February , 1963). I immediately reported this information to Agent Duncan.

On or about October 22, 1962, I received a phone call from William Merchant. He said he was in Virginia. He also said that he had been in contact with

John K. DeJarnette and Rudolph Kruse, Sr., and that he would call me back later. I immediately contacted Agent Duncan and gave him this information. He told me to keep trying to obtain what information I could and to try to make a [Page 2] deal to get the money. (I was later advised that shortly after this William Merchant was arrested for some state offense in North Carolina and has been serving a sentence since that time).

On or about November 29, or November 30, 1962, Rudolph Kruse, Sr., called and asked me to meet him at Cunninghams Restaurant at 5th and Breckinridge Streets here in Louisville. (Kruse was not wanted or charged for any of the bank robberies at this time). Before meeting Kruse I tried to reach Agent Duncan but could not find him. I followed Agent Duncan's instruction and discussed with Kruse the possibility of trying to get the bank money to help the F.B.I. to capture John K. DeJarnette and more particularly those who were involved with him in the commission of these robberies. Kruse did not give any information about the money or the robbery and instead said that he did not know John K. DeJarnette. (I found out later that Kruse wanted to meet me to use me as an alibi of his whereabouts at the time we were at Cunninghams). I reported all this to Agent Duncan as soon as I could reach him after this meeting.

I heard no more from Kruse until some time in the Spring of 1963. (He had been indicted in February, 1963 for conspiracy and robbery of the second bank on October 10, 1962). When Kruse contacted me by phone he asked me if I would make his bond if he could get it cut. He also said he had talked to an attorney. I told him to call me if the bond were re-

duced and I would discuss the matter. I told him that I would see if the Company would authorize me to make the bond and to call me back. He said he would call me in a couple of days. I told Agent Duncan about this and all other phone calls I got from Kruse. Agent Duncan told me to try to get Kruse to surrender and to tell him that nothing could [Page 3] be done while he remained a fugitive. When Kruse would call I told him to surrender and then try to get the bond reduced; that no government official would try to make any agreement with him about trying to get the bond reduced as long as he was a fugitive. He told me that he had an attorney, Robert Hogan, who was going to the court and make a motion to get the bond reduced and would call me later. I reported this to Agent Duncan and also spoke to Agent Duncan many more times, either when I would see him in one of the courts or when I would call him to report any information I had or rumor I might hear.

These calls went on until one day or night Kruse called and said that Mr. Hogan could not get the bond reduced and that he had talked to Frank E. Haddad, Jr., who told him that he would not even ask that the bond be reduced because no one would deal with a fugitive.

I knew how bad the Government wanted Kruse, Sr. They had already had DeJarnette and Kruse, Jr., and Kruse, Sr., was the only one who had not been arrested. Agent Duncan has been a friend of mine and he kept telling me to encourage Kruse, Sr., to surrender.

Kruse, Sr., said he did not have the bond fee of $2,500.00 (The fee is 10% of the amount of the bond, which in this case was $25,000.00) and that he would

not surrender unless he could make bond and be released immediately. I wanted to help Agent Duncan if I could. I told Kruse that if he would surrender to me I would agree to make the $25,000.00 bond for one-half the price, or $1,250.00. This would be the price of a bond of $12,500.00 and in that he was not about to get his bond reduced I would make it for $1,250.00. (I wish the Court to know that the Company received $500.00 as their share of the fee. I actually made only $750.00 on this bond [Page 4]. Also under my contact with the Wabash Fire and Casualty Insurance Company I must personally reimburse them for any judgment which they have to pay).

Kruse, Sr. agreed to surrender under the above arrangements and when he came to my office I took him to Mr. Haddad and Agent Duncan who met us in the lobby of the Kentucky Home Life Building. The three of them, Agent Duncan, Mr. Haddad and Kruse, Sr., went to the Marshal's office in the Federal Building and I had Marvin Berg meet them to execute the bond.

Under ordinary circumstances I would not have made Kruse, Sr.'s bond even for the full fee but did so for half fee and a net of only $750.00 to myself. I knew that on one other occasion Kruse was a fugitive from a Federal charge for 18 months. I wanted to try to help Agent Duncan. I spent many hours and a great deal of my time during business hours in an effort to help the Government get information to help solve the case and also to help get Kruse to surrender.

I wish also to state that after Kruse had surrendered and was released on bond he asked me several times and more particularly the days immediately before his trial if I would make an appeal bond in the event he would be convicted. I told him I would.

Affidavit of Lawrence Detroy

I came into the Court room when Mr. Rivers was arguing the case and also heard the Court give the jury instructions. The jury retired and the Court immediately recessed until return of the jury. After this Kruse came back and spoke briefly to me and walked out of the Court Room with his family and stopped in the hall and sat on the bench outside the Court Room. I was under the impression that Kruse would be in custody when the jury retired to deliverate [sic]. This has been the practice in State Court. I [Page 5] asked John Young, Deputy United States Marshall why Kruse was not taken into custody by him. He said that he was not his prisoner or words to this effect. I walked all the way around the hall to the back of the Court Room to get to Judge Brooks' office. I knocked on the door which I thought was the Judges office but which I now know to be the outer office of his reception room. I received no answer and went back around the front of the Court Room and could not see Kruse. I went to several restaurants in the area. I returned to the office and was notified that Kruse was missing. I immediately had an employee go to the airport (when he saw Agent Demoluskie who gave him a picture of Kruse) and then he caught a plane to Indianapolis to try to get Kruse if he arrived there because I knew he had some connections in Indianapolis. The employee returned the next day.

On or about November 20, I gave Agent Duncan certain information I had received about Kruse as to whereabouts in California which I honestly felt would lead to his arrest. On or about November 21, 1963, several officers of the F.B.I. were notified by Agent Duncan's communications that Kruse was arrested in California on November 27, 1963.

Affidavit of Lawrence Detroy

I have tried in every way possible to help the Government in this matter. I have done everything they ask me to do. After Kruse was indicted and was a fugitive for about six months, I feel that without my helping Agent Duncan and agreeing to make the bond for one-half the fee, Kruse could have been a fugitive for many more months and a far greater expense to the Government. I am told that it was very expensive for the Government when one is being sought. It must be remembered that Kruse was one time before a fugitive from a federal charge for eighteen months before [Page 6] he either surrendered or was captured. When he jumped this bond he was gone only 32 or 33 days before captured. I feel that the many months of expense I saved the Government far exceeds the expense of these 32 or 33 days of expense the Government may have incurred.

The incentive I had in trying to help Agent Duncan was that he had befriended me before in certain matters. The incentive I had in spending money and time in trying to capture Kruse as after his jumping this bond was to save as much money as I could. If I were to recope my expenses only there would be no incentive even to try to find someone who jumps bail because I would certainly lose money if we subtract only the expenses. It is difficult to estimate how much expense I incurred because much was cash outlay to buy information.

I have acted in good faith and feel that justice would be done in this matter if no judgment were taken against me or if only the cost transporting Kruse back to Kentucky were charged to me.

I would deeply appreciate any consideration the Court would give me in this matter.

Affidavit of Lawrence Detroy

Affiant, Lawrence Detroy

Subscribed and sworn to before me by Lawrence Detroy, this 30th day of March, 1964.

My commission expires .....

.....

Notary Public, State at Large, Kentucky

APPENDIX E

AFFIDAVIT OF WILLIAM R. DUNCAN
Filed April 17, 1964

I, William R. Duncan, being duly sworn hereby make the following free and voluntary statement to Paul H. Stoddard, Special Agent in Charge of the Federal Bureau of Investigation, Louisville, Kentucky.

I am in receipt of a document entitled, "Memorandum in Support of Motion to Set Aside Bond Forfeiture or Motion to Remit Judgment," which was filed in United States District Court for the Western District of Kentucky at Louisville, Kentucky, by Attorneys for Lawrence Detroy, bondsman, and the Wabash Fire and Casualty Insurance Company.

In the memorandum, the affiant, Lawrence Detroy, makes certain statements about information he furnished to me concerning Rudolph Henry Kruse, Sr. I am making this affidavit to set the record straight regarding information furnished by Detroy to me.

In order to fully understand the present motion for judgment on the bond forfeiture, a brief synopsis of the facts of the original violation as they pertain to Kruse follows:

On September 10, 1962, the Seventh and Hill Branch of the Liberty National Bank and Trust Company in Louisville, Kentucky, was robbed by a white male of approximately $23,000. Within several days following the robbery, John Kinchloe DeJarnette was developed as a prime suspect; however, sufficient evidence was not available until September 26, 1962, to obtain a warrant which was obtained and issued in Louisville, Kentucky.

Affidavit of William R. Duncan

On October 4, 1962, information was first received indicating others were involved with DeJarnette and in fact DeJarnette was planning a second robbery somewhere in Louisville. Among those identified as associating with DeJarnette and possibly being involved was Rudolph Henry Kruse.

On October 10, 1962, the Highland Branch of the Liberty National Bank and Trust Company was robbed of approximately $36,000 by DeJarnette.

Subsequent investigation established that Rudolph Henry Kruse was in fact involved with DeJarnette and was undoubtedly DeJarnette's Louisville contact.

Kruse himself was interviewed concerning DeJarnette on November 27, 1962, but denied any knowledge of the robbery or association with DeJarnette. Shortly after the interview and prior to December 25, 1962 Kruse left the Louisville area.

On February 25, 1963, a Federal Grand Jury convened at Louisville, Kentucky, returned a three-count indictment against Kruse charging him with Conspiracy and Aiding and Abetting DeJarnette in the robbery of October 10, 1962. A Bench warrant was issued and a $25,000 bond recommended thereon.

From that day until July 9, 1963, Kruse remained in fugitive status. On July 9, 1963, he was surrendered to Special Agent William R. Duncan by his attorney Frank E. Haddad, Jr., and immediately posted the $25,000 bond, the bond being posted by Marvin Berg on behalf of Lawrence E. Detroy, a Louisville bondsman.

Between July 9, 1963 and October 14, 1963, Kruse remained free on bond. On October 14, he appeared in Federal District Court to answer the indictment at which time he entered a plea of not guilty and trial

was set for October 25, 1963. His bond was continued.

On October 25, 1963, he was tried before a Petit Jury with the case being given to the jury at approximately 5:10 p.m. At approximately 6:00 p.m. the jury returned to the courtroom to ask a question of the judge at which time it was discovered Kruse had absconded from the courtroom without the knowledge of his bondsman.

A bench warrant was issued immediately and a motion for bond forfeiture sustained.

On October 26 the jury found Kruse guilty of two of the three counts of the indictment.

Kruse remained in fugitive status from October 25, 1963, until November 27, 1963, when he was apprehended in Palo Alto, California, and subsequently returned to Louisville.

With respect to Page 1, Paragraph 2, of the affidavit, I wish to state that the Louisville Office of the Federal Bureau of Investigation had no knowledge of Rudolph Henry Kruse, Sr., being involved in the Seventh and Hill branch bank robbery on September 10, 1962, until October 4, 1962. Thus I could not have asked Detroy about Kruse at this time. To the contrary, Detroy was contacted on September 10 and 13, 1962, on another matter and there was no mention of Kruse or DeJarnette.

Detroy was asked on September 13, 1962, to furnish the serial numbers of any money used to make the bonds of Frank O'Dell Gaines, Kenneth Lee Crady, and Barbara Echner Cain who were arrested on September 11, 1962, with a quantity of the money from the Seventh and Hill bank robbery in their possession.

With respect to Page 1, Paragraph 3, our records reflect that Detroy contacted Rudolph Henry Kruse,

Sr., and furnished results of the contacts to me, the first contact being October 14, 1962, the second being October 23, 1962, and the next times being November 30, 1962, and December 31, 1962.

With respect to Page 1, Paragraph 4 and continued on Page 2, first paragraph, this is true to the best of my knowledge.

With respect to Page 2, Paragraph 2, with the exception of the last line, this is true. Regarding the last line, I have no knowledge that Merchant was in Ohio. The surveillance of Merchant began in Louisville and ended near Louisville, Kentucky, on October 10, 1962, when DeJarnette was identified as the robber of the Highland Branch of the Liberty National Bank and Trust Company, Louisville, Kentucky, October 10, 1962.

With respect to Page 2, Paragraph 3, Detroy on October 14, 1962, advised me that on the night of October 13, 1962, he had received a call from Rudolph Henry Kruse, Sr., and that he claimed he was out of town at his father-in-law's. On October 23, 1962, Detroy advised that he had been in contact with Kruse, Sr., on the night of October 22, 1962, and that Kruse claimed he had no business with DeJarnette or Merchant.

With respect to Page 2, Paragraph 4, this information is true to the best of my knowledge.

With respect to Page 3, Paragraph 1, on November 30, 1962, Detroy advised me that Rudolph Henry Kruse, Sr., called him on Thursday, November 29, 1962, and on Friday, November 30, 1962, and told him about being questioned by Special Agent Robert M. Domalewski of the Federal Bureau of Investigation concerning his knowledge of John Kinchloe DeJar-

nette. Kruse asked Detroy if he remembered having lunch with him at Cunningham's Restaurant in Louisville. Detroy said he told Kruse he did but did not remember the date. He said that Kruse told him it was the day that DeJarnette had robbed the second bank in Louisville. Detroy was reminded that this could not have been the day as this was the date Bill Merchant was with him. This was the first time I knew of a meeting between Detroy and Rudolph Henry Kruse, Sr.

With respect to Page 3, Paragraph 2, Detroy furnished no further information concerning Kruse, Sr., until May 7, 1963, when he stated that Kruse had not contacted him and to his knowledge, he had not contacted Attorney Frank E. Haddad, Jr.

On May 13, 1963, Detroy was specifically asked if he had received any further information from Kruse, Sr. He replied that he had not.

On June 20, 1963, Detroy advised that fifteen minutes before he called me Kruse had just phoned him and wanted to make arrangements to give himself up on June 24, 1963. Detroy told me that he had told Kruse that he was going to call me and tell about the phone call.

With respect to Page 4, Paragraph 1, I have no information in writing or any recollection of Detroy telling me about Attorney Robert Hogan attempting to get Kruse's bond reduced.

With respect to Page 4, Paragraph 4, I know nothing about Detroy and Kruse's arrangements regarding bond until Kruse had fled the Federal courtroom on October 25, 1963.

With respect to Page 5, Paragraph 1, on July 9, 1963, Rudolph Henry Kruse, Sr., was surrendered to

me by Attorney Frank E. Haddad, Jr., and Bondsman Detroy. Kruse was taken to the United States Marshal's Office immediately where his bond was made by Detroy's partner, Marvin Berg.

With respect to Page 6, Paragraph 2, on October 26, 1963, Detroy told me about being in court on October 25, 1963, when Kruse fled the court and that he had sent someone to Indianapolis to look for Kruse, Sr.

On October 28, 1963, Detroy advised that he had learned that Kruse allegedly had surrendered himself on July 9, 1963, because his wife needed surgery but to his knowledge, she had not had any such surgery.

On November 20, 1963, Detroy gave me information that when Kruse was in Los Angeles trying to get in touch with John Kinchloe DeJarnette during December, 1962, his contact was Charles John Forsting and that James Thomas Scott was a close associate of Kruse. Investigation was requested to locate Kruse on the basis of this information.

Kruse was apprehended in Palo Alto, California, on November 27, 1963, as the result of other investigation conducted by the Federal Bureau of Investigation not involving either Forsting or Scott.

William R. Duncan
Special Agent, FBI,
Louisville, Kentucky

Sworn and subscribed before me on April 6, 1964, at Louisville, Kentucky.

Paul H. Stoddard
Special Agent in Charge,
FBI, Louisville, Kentucky

Affidavit of William R. Duncan

Witness:

Joseph H. Gamble
Assistant Special
Agent in Charge, FBI,
Louisville, Kentucky

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 873

WABASH FIRE AND CASUALTY INSURANCE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–4a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1965, and a petition for rehearing was denied on December 4, 1965. The petition for a writ of certiorari was filed on January 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the accused, by fleeing from the courtroom after the jurors had retired to consider their ver-

205-471—66

dict, breached the conditions of a continuing bond for his appearance.

2. Whether the district court abused its discretion in ordering the accused's surety to pay $20,000 on a $25,000 appearance bond.

RULE INVOLVED

Rule 46, F.R. Crim. P., provides:

> (f) *Forfeiture.*
>
> * * * * *
>
> (2) *Setting aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
>
> * * * * *
>
> (4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.
>
> * * * * *

STATEMENT

The United States District Court for the Western District of Kentucky entered judgment for $20,000 on a forfeited appearance bond against Rudolph Henry Kruse, Sr., an accused, and the petitioner, his surety (R. 47a–48a). On appeal (R. 48a), the conviction was affirmed (Pet. App. 1a–4a).

On February 25, 1963, Kruse was indicted for conspiracy and bank robbery violations of 18 U.S.C. 2113 (a) and (d) (R. 5a–7a). From that date until July 9, 1963, he was a fugitive (R. 35a). On July 9, 1963, he was surrendered by his attorney to agent Duncan and

posted a $25,000 bond with petitioner (for whom one Lawrence Detroy is an agent) as surety (R. 8a–10a, 35a, 40a–41a).

On October 25, 1963, Kruse appeared pursuant to a court order, and his trial was held (R. 35a–36a). At 5:01 p.m. the jury retired to consider its verdict (R. 56a). After the court had recessed to await the return of the jury, Detroy shook hands with Kruse, who walked toward the doorway of the Federal Building. When Detroy asked a deputy marshal whose prisoner Kruse was, the reply was that Kruse was not in the custody of the United States Marshal and that, if he were, he would not be walking out the door (R. 43a, 56a). Detroy then looked for Kruse in the vicinity of the courthouse but could not find him (R. 25a–26a). At about 5:55 p.m., the jury returned to the courtroom, but Kruse was not present (R. 56a). On the following day, with Kruse still absent, the jury found him guilty on Counts 1 and 2 of the indictment (R. 57a, 61a). On October 29, 1963, the government's motion for forfeiture of the bond was sustained (R. 2a). On November 27, 1963, F.B.I. agents apprehended Kruse in California as a result of their own investigation, independent of leads as to Kruse's possible whereabouts given to agent Duncan by Detroy (R. 39a, 26a). On December 23, 1963, Kruse was given concurrent sentences of five years' imprisonment on Count 1 and twenty years on Count 2 (R. 14a–16a).

On March 2, 1964, the government filed in the district court a motion for judgment on the previously forfeited bond in the amount of $25,000 (R. 16a). Petitioner filed a motion to set aside the bond for-

feiture or to remit judgment, supported by Detroy's affidavit (R. 19a–27a), and the government filed a response, also supported by affidavits (R. 30a–43a). In his affidavit, Detroy said that Kruse, after he was indicted, asked by telephone whether Detroy would make his bond if Kruse could get it cut, and that he (Detroy) reported this fact to F.B.I. agent Duncan, who told him to try to get Kruse to surrender and to tell him that nothing could be done while he was a fugitive (R. 23a). Detroy said that in order to help agent Duncan he agreed that the price for a $25,000 bond would be $1250 instead of the usual price of $2500 (R. 24a). He also said that he tried in every possible way to assist the government in apprehending Kruse (R. 26a). He found it difficult to estimate his expenses "because much was cash outlay to buy information" (R. 27a).

The affidavit of agent Duncan in support of the government's response admitted that Detroy had reported that he had been contacted by Kruse a number of times after October 1962 (R. 36a–38a). On October 28, 1963, according to the affidavit, Detroy told Duncan he had learned that Kruse allegedly had surrendered himself in July 1963 because his wife needed surgery, but that no surgery had been performed (R. 39a). The agent knew nothing about the arrangements regarding bond until Kruse fled on October 25, 1963 (R. 38a).

On May 20, 1964, the district court issued an order stating that "justice does not require the enforcement of the forfeiture in its entirety and judgment in the sum of $20,000 will be entered" (R. 45a–46a). On

June 5, 1964, petitioner filed a motion for partial remission of the judgment so that it would not exceed $6,239.80, the amount of the expenses incurred by the government in apprehending Kruse after his flight (R. 46a–47a, 32a). On the same day the court entered final judgment for $20,000, from which petitioner appealed (R. 47a–48a). The court of appeals affirmed *per curiam*.

ARGUMENT

1. Kruse did not, merely by appearing for trial on October 25, 1963, satisfy the conditions of the bail bond, as petitioner contends (Pet. 19–20). The bond required that Kruse appear in court on October 7, 1963, and "from time to time thereafter" at such times and places as required by the court's order, and that he "abide any judgment * * * by surrendering himself to serve any sentence imposed * * *" (R. 8a); it was a "continuing" bond which was to remain in effect until Kruse and petitioner were exonerated (R. 9a). Kruse's flight after the jury retired to consider its verdict rendered him unavailable for surrender under the sentence, a condition of the bond.

2. The district court acted within its discretion in remitting only $5,000 of the forfeiture on the $25,000 bond. *United States* v. *Peerless Insurance Co.*, 343 F. 2d 759 (C.A. 2), certiorari denied, 382 U.S. 832; *Larson* v. *United States*, 296 F. 2d 167, 170 (C.A. 8); *United States* v. *Davis*, 202 F. 2d 621, 625 (C.A. 7), certiorari denied *sub nom. Ferguson* v. *United States*, 345 U.S. 998. The court was not required to limit the judgment to $6,239.80, the amount of the expenses in-

curred by the government in apprehending Kruse. The contract in the bond contained no such limitation; it specified $25,000 as the definite amount to be paid upon default, and could have been enforced for the full amount. *E.g., United States* v. *Public Service Mutual Insurance Co.*, 282 F. 2d 771 (C.A. 2); *United Benefit Fire Insurance Co.* v. *United States*, 306 F. 2d 325 (C.A. 9). Detroy, who wrote the bond for his own profit, had to satisfy himself that the premium charged was sufficient to compensate for the risk involved; he was well aware of a possible liability for the full amount of the bond. And the district court took into consideration Detroy's attempts to assist in Kruse's apprehension when it remitted $5,000 of the forfeiture (R. 45a–46a).[1]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] *United States* v. *D'Argento*, 339 F. 2d 925 (C.A. 7), on which petitioner relies, is inapposite; the court of appeals there held that there should have been no forfeiture at all. The decision recognized that, where forfeiture is justified, the *amount* of remission—petitioner's principal complaint (see Pet. 14)—is within the discretion of the district court.

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